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**C Paul D'Cruz v
Chow Tai Yow & Sons Sdn Bhd**

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO 11-7 OF 1997
ABDUL MALIK ISHAK J
6 JANUARY 1998

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Civil Procedure — Judgment — Default of appearance — Application to set aside — Judgment in default of appearance — Whether defence on merits disclosed

C

Landlord and Tenant — Controlled premises — Recovery of possession — Tenant not in occupation of rented premises — Whether equity would come in aid of tenant

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The respondent was the registered proprietor of premises No 36D, Jalan Wong Ah Fook, 8000 Johor Bahru, categorized under the Control of Rent Act 1966 ('the premises'). The appellant rented the premises from the respondent and in turn rented it out to a third party, against whom he was pursuing an action in the Johor Bahru Sessions Court for inter alia, arrears of rental and mesne profits.

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The respondent brought an action against the appellant in the Johor Bahru Magistrate's Court seeking vacant possession of the premises, mesne profits, costs and other reliefs that the court deemed fit and proper. It was the respondent's stand that neither the appellant nor his family members occupied the premises and that the appellant had in fact rented out the premises to the third party at a rental exceeding 10% of the rental charged by the respondent. The appellant merely denied this allegation and claimed that he in fact stayed on the premises notwithstanding the fact that his own and separate action against the third party revealed otherwise. Counsel for the appellant also contended that there was a tenancy coupled with equity. The record of appeal showed that when the respondent's claim was fixed for hearing in the magistrate's court, both appellant and his counsel failed to appear. Thus judgment in default in favour of the respondent was entered against the appellant. The appellant applied unsuccessfully to set aside the default judgment and hence this appeal. On appeal, the High Court had to decide whether there was evidence in the appeal record disclosing a prima facie defence by the appellant, to the respondent's claim for vacant possession.

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Held, dismissing the appeal with costs:

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A judgment in default is a judgment given to the plaintiff (the respondent in this case) without the court hearing the merits of the plaintiff's case. The court has the absolute discretion to set aside such judgment on the application of the defendant (the appellant in this

case) who need only disclose a defence on the merits, namely an arguable or triable issue. On the facts, there was no prima facie defence to the respondent's claim for vacant possession. The appellant did not stay in the premises; instead he rented it out at a profit and at the date of hearing both appellant and his counsel were absent. Moreover, the appellant could not claim a tenancy coupled with equity since he was not a tenant who stayed in the premises (see pp 55F–G, 59I and 60F–H).

Obiter:

The Control of Rent (Repeal) Act 1997 was enacted for the sole purpose of repealing the Control of Rent Act 1966 with effect from 1 September 1997. Section 3 of the 1997 Act enacts that all tenancies shall be deemed to cease on 1 September 1997 whereas s 6(1) of the same Act provides that new tenancies shall be deemed to have been entered into between the tenant, sub-tenant or joint tenant on the one part and the landlord on the other part, effective from 1 September 1997. However, such right to a new tenancy is only conferred on a tenant, sub-tenant or joint tenant who is in actual and lawful occupation of the premises on 1 September 1997 (see pp 61B–C and 62E–I).

[Bahasa Malaysia summary

Penentang merupakan tuan punya berdaftar premis No 36D, Jalan Wong Ah Fook, 8000 Johor Bahru, yang dikelaskan di bawah Akta Kawalan Sewa 1966 ('premis tersebut'). Perayu telah menyewa premis tersebut daripada penentang dan pula menyewakannya kepada pihak ketiga, yang mana perayu telah memulakan tindakan terhadap pihak ketiga di Mahkamah Sesyen Johor Bahru untuk, antara lain, tunggakan sewa dan hasil perantaraan.

Penentang memulakan tindakan terhadap perayu di Mahkamah Majistret Johor Bahru meminta milikan kosong premis tersebut, hasil perantaraan, kos dan relief lain yang dianggap wajar oleh mahkamah. Ia merupakan pendirian penentang bahawa baik perayu mahupun ahli keluarganya menduduki premis tersebut dan bahawa perayu pada hakikatnya telah menyewakan premis tersebut kepada pihak ketiga pada kadar sewaan melebihi 10% daripada sewa yang dikenakan oleh penentang. Perayu hanya menafikan tohmahan ini dan menuntut bahawa ia sebenarnya tinggal di premis tersebut tanpa mempedulikan hakikat bahawa tindakannya yang tersendiri dan berasingan terhadap pihak ketiga menunjukkan sebaliknya. Peguam perayu juga menghujahkan bahawa wujudnya penyewaan bersama dengan ekuiti. Rekod rayuan menunjukkan bahawa apabila tuntutan penentang ditetapkan untuk pembicaraan di mahkamah majistret, kedua-dua perayu dan peguamnya gagal hadir. Dengan itu penghakiman ingkar memihak kepada penentang dimasukkan terhadap perayu. Perayu gagal dalam permohonan untuk mengetepikan penghakiman ingkar dan justeru itu membuat rayuan ini. Atas rayuan, Mahkamah Tinggi

- A haruslah memutuskan sama ada terdapat keterangan dalam rekod rayuan yang mendedahkan pembelaan prima facie oleh perayu kepada tuntutan penentang untuk milikan kosong.

Diputuskan, menolak rayuan dengan kos:

- B Penghakiman ingkar adalah suatu penghakiman yang diberikan kepada plaintif (penentang dalam kes ini) tanpa mahkamah mendengar merit kes plaintif. Mahkamah mempunyai budi bicara mutlak untuk mengetepikan penghakiman sedemikian atas permohonan defendan (perayu dalam kes ini) yang cuma perlu menunjukkan pembelaan atas merit, iaitu isu yang boleh diujahkan atau dibicarakan. Atas fakta-fakta, tiada pembelaan prima facie kepada tuntutan penentang untuk milikan kosong. Perayu tidak tinggal di premis tersebut; sebaliknya ia menyewakannya dengan keuntungan dan pada tarikh pembicaraan kedua-dua perayu dan peguamnya tidak hadir. Tambahan pula, perayu tidak boleh menuntut penyewaan bersama dengan ekuiti memandangkan ia bukan seorang penyewa yang tinggal di premis tersebut (lihat ms 55F–G, 59I dan 60F–H).
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Obiter:

- E Akta Kawalan Sewa (Pemansuhan) 1997 digubalkan untuk tujuan memansuhkan Akta Kawalan Sewa 1966 mulai dari 1 September 1997. Seksyen 3 Akta tahun 1997 menggubalkan bahawa kesemua penyewaan hendaklah dianggap tamat pada 1 September 1997 manakala s 6(1) Akta yang sama memperuntukkan bahawa penyewaan baru hendaklah dianggap telah diikat di antara penyewa, penyewa kecil atau penyewa bersama pada satu pihak dan tuan rumah pada pihak yang satu lagi, mulai dari 1 September 1997. Walau bagaimanapun, hak demikian kepada penyewaan baru hanya dikurniakan ke atas seorang penyewa, penyewa kecil atau penyewa bersama yang benar-benar menduduki premis tersebut dan secara sah pada 1 September 1997 (lihat ms 61B–C dan 62E–I).]
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Notes

For cases on judgment in default of appearance, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2534–2569.

- H For cases on the recovery of possession of a controlled premises, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 276–664

Cases referred to

- I *Asean Security Paper Mills Sdn Bhd v Provincial Insurance (M) Sdn Bhd* [1990] 2 CLJ 971 (refd)
Atwood v Chichester (1878) 3 QBD 722 (refd)
Bank Bumiputra (M) Bhd v Majlis Amanah Ra'ayat [1979] 1 MLJ 23 (refd)
Barnes v Kondel [1971] 1 Lloyd's Rep 544 (refd)

- Hongkong and Shanghai Banking Corp v Ismail bin Daud & Anor* [1978] 2 MLJ 160 (refd) **A**
- Malayan United Bank Bhd v Mohamed Salleh bin Mohammed Yusoff & Ors* [1988] 3 MLJ 165 (refd)
- Muir v Jenks* [1913] 2 KB 412 (refd)
- Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd & Ors* [1994] 1 MLJ 495 (refd) **B**
- Rosman bin Haji Abdul Rashid v Rosmah Begum bte Bahadur Beg* [1993] 2 MLJ 196 (refd)
- Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd* [1986] 1 MLJ 348 (refd)
- Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd* [1982] 2 MLJ 79 (refd) **C**
- SA Andavan v Registrar of Titles, Negeri Sembilan & Ors* [1977] 2 MLJ 220 (refd)
- Sockalingam Chettiar & Ors v Somasundaram Chettiar* [1941] MLJ 103 (refd)
- Taisho Marine & Fire Insurance Co Ltd v Wong Poo Peng & Ors* [1976] 1 MLJ 78 (refd) **D**
- Tan Tin Swee v Kangsar Properties Sdn Bhd* [1990] 2 CLJ 457 (refd)

Legislation referred to

- Control of Rent Act 1966 ss 4(2), 27 **E**
- Control of Rent (Application to Kelantan) Enactment 1964
- Control of Rent (Application to Perlis) Enactment 1961
- Control of Rent (Application to Terengganu) Enactment 1960
- Control of Rent Ordinance 1956
- Control of Rent (Repeal) Act 1997 ss 3, 4, 5(1), (2), 6, (1), 9, 10(4), 11, (2), (3) **F**
- Subordinate Courts Rules 1980 O 28 r 6(1)(a)

Mathews George (Danaraj & Associates) for the appellant.

Yusnida bte Mohd Yusof (Kong Yeam & Chui Sieng) for the respondent.

Abdul Malik Ishak J: The respondent was the registered proprietor of premises known as No 36D, Jalan Wong Ah Fook, 80000 Johor Bahru ('the premises') categorized under the Control of Rent Act 1966. The appellant rented the premises from the respondent and conveniently let it out for rent at RM4,000 per month to Nisamudhin bin Abu since December 1993. Since Nisamudhin bin Abu failed to pay the rental to the appellant from 15 May 1994, the appellant filed an action in the Sessions Court, Johor Bahru vide Summons Case No 52-440-1995 and sought for arrears of rentals from 15 May 1994 to 31 March 1995 amounting to RM42,000 together with mesne profits, costs and other reliefs which the court deem fit and proper. **G**

In so far as the case between the appellant and the respondent was concerned, the respondent apart from seeking vacant possession of the premises also sought for mesne profits, costs and other reliefs which **H**

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- A the court deem fit and proper. It was the respondent's stand that neither the appellant nor his family members occupied the premises and the appellant had in fact rented out the premises at a rental exceeding 10% of the rental charged by the respondent. The monthly rental charged by the respondent was a paltry sum of RM75 per month. The appellant denied the allegation by the respondent and vigorously held onto the notion that he in fact stayed
- B in the premises notwithstanding the fact that Summons Case No 52-440-1995 filed in the Johor Bahru Sessions Court told a different story.

Briefly these were the facts and on these facts the appeal came up before me for hearing.

- C Now, before the learned magistrate, Magistrate's Court, Johor Bahru, the appellant had applied unsuccessfully to set aside a default judgment giving possession of the premises to the respondent. The appeal record showed that on the date fixed for hearing, Madam Yusnida bte Dato' Mohd Yusof acting for the respondent, who was the plaintiff in the magistrate's court, asked for judgment in default as the appellant, who was the defendant in the magistrate's court, and his counsel failed to appear. The
- D learned magistrate acceded to Madam Yusnida's request and accordingly entered judgment in default in favour of the respondent. Later the appellant applied to set aside the default judgment and upon refusal by the learned magistrate, the appellant appealed.

- E Before me, the crucial question to decide would be whether there was evidence before the magistrate's court, as reflected in the appeal record, disclosing a prima facie defence by the appellant to the respondent's claim for vacant possession of the premises or, in simple words, whether there was a defence on the merits. Towards this end, and to achieve that goal, the appellant need only disclose an arguable or triable issue.

- F It is now trite that a judgment in default is a judgment given to the plaintiff, like the respondent here, without the court hearing the merits of the plaintiff's case. The court certainly has the absolute discretion to set aside the judgment on the application of the defendant, like the appellant here. *Sockalingam Chettiar & Ors v Somasundaram Chettiar* [1941] MLJ 103
- G (CA) lays down the proposition that a person should have notice of the proceedings against him and that even when an order for substituted service has been made, a judgment can still be set aside when merits are disclosed and when the court was satisfied that the defendant was not aware of the proceedings and was not avoiding service which was tantamount to knowledge of the proceedings. But the application to set aside must be
- H made within a reasonable time and in a fit and proper case the court will certainly disregard the lapse of time (*Atwood v Chichester* (1878) 3 QBD 722). The case of *SA Andavan v Registrar of Titles, Negeri Sembilan & Ors* [1977] 2 MLJ 220 lays down a very wide proposition of law and it may be stated as follows: that the court may discharge an irregular order without an application being made for that purpose. Factually, these two authorities
- I are different from the present appeal. In the present appeal, the appellant who was the defendant in the magistrate's court, failed to attend court on the date of the hearing and his counsel too was absent. In the present

appeal, the appellant filed an application to set aside the default judgment but was unsuccessful. These two salient features in the present appeal put the appellant's case on a different pedestal than the two authorities just cited. Lord Denning MR in *Barnes v Kondel* [1971] 1 Lloyd's Rep 544 sought to define the meaning of the phrase 'defence on the merits' in a simpler form. His Lordship said that that phrase must necessarily mean a defence which discloses an arguable and triable issue. As I said, the court has an absolute discretion to set aside a judgment in default and as a general rule the court will not exercise that discretion unless the defendant can establish one out of the two salient requirements that:

- (i) the judgment obtained was irregular meaning that the rules of procedure had not been dutifully followed; or
- (ii) the defendant has a defence on the merits to the plaintiff's case.

Raja Azlan Shah CJ Malaya (as His Majesty then was) succinctly said in *Bank Bumiputra (M) Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23 at p 24:

It is clear that the application to set aside the judgment in default was made under O 13 r 10 of the Rules of the Supreme Court. The rule provides:

'Where judgment is entered pursuant to any of the preceding Rules of this Order, it shall be lawful for the court or a judge to set aside or vary such judgment upon such terms as may be just.'

The rule gives the court a discretion which must be exercised judicially. It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits. An appellate court can only interfere with the exercise of the discretion if the court below has clearly acted on some wrong principle, committed some error of law or failed to consider matters which demanded consideration. I cannot think that in dealing with the application under O 13 r 10 the learned judge committed any error of law. Neither did he fail to consider all matters demanding consideration nor act on any wrong principle. In my view, all the elements are present in this case which would justify the exercise of discretion in favour of the respondents.

In my view, the respondents have disclosed a defence on the merits.

I venture to say that where the judgment is irregular or where the judgment was entered for a larger sum than was claimed, then that judgment will be deemed to be bad and as a matter of right be set aside forthwith. Ex debito justitiae, that kind of judgment would be set aside. I will even proceed to say that a judgment entered before actual default as done by the defendant would be irregular and the defendant too would as a matter of right be entitled to set it aside. In the local context, Zakaria Yatim J (now FCJ) in *Malayan United Bank Bhd v Mohamed Salleh bin Mohammed Yusoff & Ors* [1988] 3 MLJ 165 at p 169 said:

Since the respondent had entered judgment with the rate of interest after the date of judgment far in excess of the statutory rate of 8% per annum, the applicant has a right ex debito justitiae to have the judgment set aside (see *Hughes v Justin* [1894] 1 QB 667).

A In *Muir v Jenks* [1913] 2 KB 412, the plaintiff signed judgment in default of appearance for a sum in excess of that which was due to him. On an application by the defendant to set aside the judgment, one of the points taken by counsel for the defendant in the argument was that the judgment was irregular on the ground that it was signed for the wrong amount. It was suggested to the plaintiff by the Master hearing the application that the error should be rectified but counsel for the plaintiff took the stand that as the bankruptcy notice was served for the right amount nothing could be gained by rectifying the judgment. The judgment was not set aside by the Master and his decision was affirmed by Bucknill J. On appeal, the Court of Appeal held that the judgment was wrong and set it aside. Buckley LJ had this to say in his judgment (see pp 415–416):

B The point was taken before the Master, who suggested that the judgment should be amended as being wrong through an accidental slip, but counsel for the plaintiff, so far from seeking to have the judgment put into proper form, took the view that no good was to be obtained by that course and elected to stand by his judgment as it was. From May 1912 to March 1913, no question as to the judgment was raised by the debtor. Both the Master and the judge appear to have thought that the debtor himself ought to have taken steps to get the judgment corrected and that for default in so doing he was now precluded by delay from having the judgment set aside. In my opinion, that is wrong. It is the duty of the creditor if he obtains a wrong judgment to have it set right. It is not the duty of the debtor against whom he has obtained the judgment to do so. The question therefore does not turn upon delay by the debtor. The position is this. Here is a judgment which is wrong. The person who holds it has not sought to set it right, on the contrary he has said that there was no good in doing so.

F The High Court in *Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd & Ors* [1994] 1 MLJ 495 held that a defendant seeking the indulgence of the court to set aside a default judgment should make a full, frank, candid and honest disclosure of all the relevant facts. The defendant in *The Hongkong and Shanghai Banking Corp v Ismail bin Daud & Anor* [1978] 2 MLJ 160 sought to set aside a default judgment and alleged that he had a good defence. Mohd Zahir J held that in an application of this nature the defendant must produce to the court evidence to show that he has a prima facie defence. In *Tan Tin Swee v Kangsar Properties Sdn Bhd* [1990] 2 CLJ 457, the court set aside the judgment ex debito justitiae on the following facts. The writ was issued at the registry of the Alor Setar High Court and served in Kangar, Perlis that was outside the jurisdiction of the Alor Setar High Court. The plaintiff succeeded in obtaining judgment in default of appearance within twelve days of service and this prompted the defendant to apply to set aside that default judgment. The High Court held that the judgment that was obtained was premature and the defect was so fundamental that it was nothing more than a nullity. In *Taisho Marine & Fire Insurance Co Ltd v Wong Poo Peng & Ors* [1976] 1 MLJ 78, the defendant failed to set aside the default judgment because he had not shown a prima facie defence on the merits either in law or in fact.

Next would be the case of *Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd* [1982] 2 MLJ 79 and the facts may be stated as follows. The plaintiffs' claim was for the sum of \$3,904 being advances made to the defendant and the defendant had filed a defence denying the claim. When the action was called up for hearing, the plaintiffs' representative was present together with their counsel. The defendant was absent but his counsel was present. On an oral application by the plaintiffs' counsel the learned magistrate gave judgment in favour of the plaintiffs under O 28 r 6(1)(a) of the Subordinate Courts Rules 1980 ('the SCR'). Ajaib Singh J ruled that the default judgment was bad and irregular. This was what his Lordship said (see pp 79-80):

In my view, it was wrong for the learned magistrate to give judgment against the defendant by default. It is true that the defendant himself was absent when the case was called up for hearing but, as his counsel was present, the learned magistrate was not empowered to invoke r 6(1)(a) of O 28 and give judgment by default. If the learned magistrate was not inclined to exercise his discretion in favour of granting an adjournment, he ought to have proceeded to hear and determine the action in the normal manner which meant that the plaintiffs had to prove their case by adducing sufficient evidence and their witnesses would have been subject to cross-examination by the defendant's counsel who would also have had the right to call witnesses for the defence and to make a submission to the court at the end of the hearing. Similarly, if the plaintiff is absent but his counsel is present when an action is called on for hearing, the court cannot just dismiss the action but must allow the plaintiff's counsel to present his case and call witnesses if he has any in support.

In his grounds of judgment, the learned magistrate referred to r 2(1) of O XIX of the old Subordinate Courts Rules 1950 which states that at the trial or hearing of an action any party may appear in person or by solicitor. This particular rule has been omitted from the present Subordinate Courts Rules 1980 and the learned magistrate apparently thought this omission to be of some significance. It seems to me however that the old r 2(1) of O XIX was removed from the new rules as it served no real purpose. It was redundant. Both the old and new rules provide for the parties to be represented by counsel. As for the representation by counsel for the defendant, the very form of summons both under the old and the new rules states that the defendant is 'hereby summoned to appear either in person or by your advocate'. At the hearing of an action, the defendant is thus allowed to either appear in person or by an advocate and solicitor. Only if both the defendant and his counsel are absent that a default judgment may be entered against the defendant.

The plaintiff or the defendant who stays away when an action is called on for hearing does so at his peril. If his oral testimony is material and important to his case, it would be to his great disadvantage if he is absent for if the court in the exercise of its discretion refuses an adjournment and proceeds to hear the action, his counsel would not be in a position to present his case well. This is a risk which a party takes by not attending court personally on the date fixed for the hearing of the case but if his counsel is present then the court cannot simply throw his case out.

For the reasons which I have set out, I would say that the default judgment given against the defendant on 4 July 1981 was bad and irregular. The defendant was therefore entitled to bring his appeal to the High Court

A without first applying to the magistrate's court to set aside the judgment. In the circumstances therefore, I allow the appeal and order that the case be remitted to the learned magistrate for hearing. As the learned magistrate has not heard the case on its merit he is perfectly entitled now to hear it himself or if he is so inclined to arrange for some other magistrate to hear it.

There will be no order as to costs.

B In *Asean Security Paper Mills Sdn Bhd v Provincial Insurance (M) Sdn Bhd* [1990] 2 CLJ 971, Anuar J said:

C A regular judgment entered in default of appearance should not be set aside unless good reason is given. In this case, I do not think the defendants have given any good reason for the failure to enter appearance. The judgment should not be set aside on this ground.

It has, however, been decided that where an application is made for setting aside a judgment in default the court must consider the merits of the case. Now, a defence on the merits simply means raising only an arguable or triable issue.

D Edgar Joseph Jr J (now senior FCJ) in *Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd* [1986] 1 MLJ 348 said (see p 350):

But I much prefer the later House of Lords case of *Evans v Bartlam* [1937] AC 473 which I believe to be the locus classicus on the point. Lord Atkin speaking for the House in that case enunciated the principles applicable thus:

E 'The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.'

H Accordingly, with Lord Atkins principles in mind, I scrutinised the record to see if there was evidence in the court below disclosing a prima facie defence to the plaintiff's claim for possession.

Now, applying all these principles of law to the factual matrix of the present appeal, I must endeavour by perusing through the appeal record to ascertain whether before the magistrate's court there was evidence disclosing a prima facie defence to the respondent's claim for vacant possession.

I Mr Mathews George for the appellant argued that there was tenancy coupled with equity and he cited *Rosman bin Haji Abdul Rashid v Rosmah Begum bte Bahadur Beg* [1993] 2 MLJ 196 where at p 204, I said:

Even if I am wrong in that the notice to evict was good in law, there is another hurdle to overcome and that is: whether there was a tenancy coupled with equity vested in the respondent? The principle of equity or what is sometimes referred to as equitable estoppel was succinctly stated by Lord Kingsdown in *Ramsden v Dyson* (1866-67) LR 1 HL 129, in particular at p 170:

‘The rule of law applicable to the case appears to me to be this: If a man, under verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v Mighell* 34 ER 341 and, as I conceive, is open to no doubt.’

Lord Denning MR further explained and refined the principle of equitable estoppel in *Inwards & Ors v Baker* [1965] 1 All ER 446 in particular at pp 448-449:

‘... in this case, even though there is no binding contract to grant any particular interest to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to say there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do.’

Incidentally *Rosman bin Haji Abdul Rashid v Rosmah Begum bte Bahadur Beg* was also reported in three other popular local law journals vide [1993] 1 AMR 919; [1994] 2 CLJ 101 and [1993] MMD (Sept) para 868.

But, with respect, the appellant here did not stay in that premises. He rented it out to Nisamudhin bin Abu at a profit. Not being a tenant who stayed in that premises how could the appellant claim that he had a tenancy coupled with equity? The statement of claim and the statement of defence were filed and on the date of hearing the appellant and his counsel were absent, and Madam Yusnida bte Dato’ Mohd Yusof correctly applied for and the learned magistrate rightly gave judgment in default. In my judgment, there is no prima facie defence to the respondent’s claim for vacant possession. The appeal should therefore be dismissed with costs. The decision of the learned magistrate must be affirmed forthwith.

Addendum

It was not disputed that the premises was under the Control of Rent Act 1966 (‘the Act’) and this meant that the premises must have been completed before 1 February 1948 as envisaged under s 4(2) of the Act. It is interesting to note that this Act was not the first piece of legislation that was introduced to control rental of premises in Malaysia. The predecessors to this Act were:

- A** (1) the Control of Rent Ordinance 1956;
(2) the Control of Rent (Application to Kelantan) Enactment 1964;
(3) the Control of Rent (Application to Perlis) Enactment 1961; and
(4) the Control of Rent (Application to Terengganu) Enactment 1960,
B and all these were repealed by s 27 of the Act when it came into force on 1 January 1967.

Parliament has enacted the Control of Rent (Repeal) Act 1997 solely for the purpose of repealing the Act with effect from 1 September 1997 and to provide for transitional provisions. The Government has been very magnanimous as it allowed for a transitional period before the Act finally comes to an end. From 1 January 2000, the Act will cease and this will mean that there will no longer be any more rent controlled premises in Malaysia. It is not difficult to ascertain the rationale for the introduction of the Control of Rent (Repeal) Act 1997. The explanatory statement to the relevant Bill of Parliament sets out the reasons thereto and it is germane to reproduce them here:

- D** With the passage of time, the Act, which was originally enacted in 1966 to regulate and control the rental of privately-owned buildings built (on or) before 31 January 1948 owing to the shortage of housing during the post-war period, has since outlived its usefulness.

- E** On the contrary, it has lent itself to abuse with the further subletting of the controlled premises by the tenants at the expense of the landlords.

It is now felt that the time has come for the Act to cease to operate, and for the landlords to be able to recover possession of the controlled premises for purposes of development.

- F** However, to alleviate the immediate need for alternative housing consequent upon the repeal and to facilitate adjustments by tenants to payment of rental at market rates, a transitional period is provided for.

At the end of the transitional period, landlords are entitled to recover vacant possession of the premises.

- G** It was quite obvious that the appellant had abused the Act when he rented the premises to Nisamudhin bin Abu at RM4,000 per month at the expense of the respondent. The appellant made a hefty profit of RM3,925 per month and arithmetically the appellant gained 98.1%. That was daylight robbery.

- H** There is a savings provision in the Control of Rent (Repeal) Act 1997 and it is found in s 4 thereof which enacts that the repeal of the Act in no way affects the validity of all proceedings commenced before the repeal of the Act and are still pending immediately prior to the repeal of the Act, particularly in regard to two matters:

- (1) fair rent; and
(2) recovery of possession of controlled premises.

- I** Likewise, all orders, decisions or judgments made or passed before the repeal of the Act particularly relating to the two matters alluded to by me, will still be valid. In short, for the sake of continuity of pending proceedings

the Act will continue to apply to all such proceedings, orders, decisions or judgments as if the Act had not been repealed. For brevity s 4 of the Control of Rent (Repeal) Act 1997 is now reproduced:

The repeal of the Act under s 2 shall not affect any proceedings commenced before the repeal of the Act and still pending immediately prior to the repeal of the Act, or any orders, decisions or judgments made before the repeal of the Act, in respect of —

(a) fair rent; and

(b) recovery of possession of controlled premises,

and the Act shall continue to apply to the proceedings or orders, decisions or judgments as if the Act had not been repealed.

The expression 'transitional period' has been defined in s 5(1) of the Control of Rent (Repeal) Act 1997 to mean the period commencing on 1 September 1997 and ending on 31 December 1999. It covers a span of 28 months, just before we enter the new millennium — the year 2000. A word of caution though. That 28 months transitional period may be terminated earlier than the expiry date in any State or in such part or parts of the State or in the Federal Territory of Kuala Lumpur. Naturally, such earlier date will be determined by the Minister by way of a gazette notification after consultation with the State Authority (see s 5(2) of the Control of Rent (Repeal) Act 1997).

Section 3 of the Control of Rent (Repeal) Act 1997 is quite interesting. It enacts that all tenancies shall be deemed to have ceased on 1 September 1997, whereas s 6(1) thereof enacts that new tenancies shall be deemed to have been entered into with the landlords after 31 August 1997 and that would be on 1 September 1997. For brevity, s 6 of the Control of Rent (Repeal) Act 1997 is now reproduced:

- (1) Notwithstanding section 3, any tenant, sub-tenant or joint tenant who —
 - (a) was in actual occupation of the premises on the date of the repeal of the Act; and
 - (b) could have lawfully continued to occupy the premises but for the repeal of the Act,shall be deemed to have entered into a tenancy with the landlord as from the date of the repeal of the Act.
- (2) Unless sooner terminated by mutual consent of the parties, a tenancy deemed to have been entered into under subsection (1) shall be in force until the expiry of the transitional period.

It is crystal clear that by s 6(1) of the Control of Rent (Repeal) Act 1997 a tenancy is deemed to have been entered into immediately between the tenant, sub-tenant or joint tenant of the one part, and the landlord of the other part, commencing on 1 September 1997. But such right to a new tenancy is only conferred on a tenant, sub-tenant or joint tenant who is in actual and lawful occupation of the premises on 1 September 1997.

It seems that during the transitional period the only ground for the recovery of vacant possession of the rent controlled premises would be for

- A** non-payment or arrears of rent. Section 9 of the Control of Rent (Repeal) Act 1997 enacts as follows:

Except for the right to vacant possession of the premises under s 8, no landlord is entitled to recover vacant possession of the premises for any other reason during the transitional period.

- B** Must the landlord compensate the tenant for recovery of vacant possession of the premises during the transitional period? This is the question that begs to be answered. But the position is made clearer upon the expiry of the transitional period as can be seen in s 11 of the Control of Rent (Repeal) Act 1997. That section is worded thus:

- C** (1) Upon the expiry of the transitional period under subsection 5(1) or 5(2), as the case may be, all tenancies deemed to have been entered into between the landlords and tenants under subsection 6(1) shall cease to be in force and the landlords shall thereafter —
- (a) have the right to vacant possession of the premises from the tenants without payment of any compensation; and
- D** (b) be entitled to any rental accrued and remaining unpaid from the tenants as at the date of the expiry of the transitional period.

Although the Control of Rent (Repeal) Act 1997 is a short compact statute comprising only 12 sections, it contains innumerable ambiguities which must be answered one way or the other. To date, these innumerable ambiguities have not been ironed out satisfactorily. A germane question to pose would be this: How would the State Authority calculate the rental payable monthly by the tenant for rent controlled premises during the transitional period? Perhaps it is a consolation to know that the Schedule to the Control of Rent (Repeal) Act 1997 contains the formula for calculating the rental payable monthly by the tenant for the rent controlled premises.

F But then the nagging question would be and shall always be: How to apply that formula? There are other ambiguities that can easily be discerned. To name a few:

- (1) When will the landlord give to the tenant the three months' notice to exercise the right to possession after 31 December 1999?
- G** (2) Is it to be given before, on or after 31 December 1999?
- (3) Should it be given after the expiry of the transitional period and that would be after 31 December 1999?
- (4) Can the notice be given before the expiry of the transitional period, for example three months before 1 January 2000?
- H**

Subsections (2) and (3) of s 11 of the Control of Rent (Repeal) Act 1997 are not enlightening either and it is enacted as follows:

- (2) A landlord who wishes to exercise his right under paragraph (1)(a) shall serve on the tenant a notice to vacate the premises.
- I** (3) The notice referred to in subsection (2) —
- (a) shall provide for a period of three months for the tenant to vacate the premises; and

- (b) may be served on the tenant or anyone authorized to accept service on his behalf, hereafter referred to as 'the person to be served' — **A**
- (i) by delivering it personally to the person to be served;
 - (ii) by sending it by registered post addressed to the person to be served at the usual or last known place of residence of the person; or
 - (iii) by affixing it on some conspicuous part of the premises to which it relates if the person to be served cannot be served personally or by registered post. **B**

Be that as it may, at the end of the day all these innumerable ambiguities may be answered by the courts. That day may not arrive at all because of the express provision in s 10(4) of the Control of Rent (Repeal) Act 1997 which enacts that the decision of the De-control Tribunal is final. **C**

Appeal dismissed with costs.

Reported by Andrew Christopher Simon **D**

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